

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 336 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgment?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

PUSHPABEN D/O SOMABHAI CHAVDA

Versus

MULCHANDBHAI SHANKERBHAI RATHOD

Appearance:

MS SHALINI S MAIR for the Petitioner.

MR PINAKIN M RAVAL for the Respondent.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 12/04/2004

ORAL JUDGEMENT

The petitioner is the original defendant of HMP
No.20 of 2002, which was filed by the
respondent-plaintiff, in the Court of Civil Judge (Senior
Division) at Gandhinagar. In the said proceedings, an ex

parte decree was passed by the trial court, against which the petitioner herein initially preferred an appeal, being First Appeal No.806 of 2003, before this Court. This court came to the conclusion that appeal is competent before the District Court and, accordingly, the appeal memo was returned for presentation before the proper court.

Subsequently, after receiving the appeal memo from the Registry of this Court, the present petitioner preferred an appeal before the District Court, being Regular Civil Appeal No.11 of 2003.

During the pendency of the said appeal, it was noted by the present petitioner that there was some delay in filing the said appeal. Therefore, a separate application, Exhibit 13, was preferred in the said appeal, requesting the Court to permit the petitioner to file an application for condonation of delay. Since the other side objected granting of such permission, the Court kept the application for hearing.

The learned appellate Judge, after hearing both the sides, came to the conclusion that since no separate application is preferred along with the appeal memo, the prayer made in the said Application for granting permission for preferring such application for condonation of delay cannot be granted. The learned appellate Judge, therefore, rejected the said prayer. It is against the said order, the petitioner has preferred the present Civil Revision Application.

Ms.Shalini Mair, learned Advocate for the petitioner, vehemently submitted that, initially, by mistake, the petitioner has preferred an Appeal before the High Court, being First Appeal No.806 of 2003, but since this Court was of the opinion that appeal is maintainable before the District Court, ultimately, the appeal memo was returned to the present petitioner and within a few days, such appeal was preferred before the District Court. She submitted that the District Court, therefore, should have decided the appeal on merits, especially when the appeal, which was preferred before this Court, was within the period of limitation. She submitted that delay, if any, in preferring appeal before the District Court occasioned only because the petitioner, under a bona fide impression, was prosecuting the appeal before this Court and this Court returned the appeal memo to the petitioner for presentation of the appeal before the proper court. She also submitted that the trial court has committed unnecessary haste, in as

much as, within a short time, decree for divorce was granted, as the HMP was of 2002 only.

Mr.Raval, learned Advocate for the respondent, on the other hand, submitted that since this revision is against an interlocutory order, the same is not maintainable in view of the amendment in Section 115 of the Code of Civil Procedure. Mr.Raval further submitted that since a separate application for condonation of delay was not preferred, the appeal, which is filed beyond the period of limitation, is not maintainable. He further submitted that, in the meanwhile, his client has remarried and, therefore, also, this Court may not entertain this revision application.

It is required to be noted that, initially, the petitioner had preferred an appeal before this Court, which was within the period of limitation. The High Court, ultimately, found that, instead of preferring First Appeal before the High Court, such appeal was competent before the District Court and that is why the appeal memo was returned to the learned Advocate for the petitioner. The learned Advocate for the petitioner submitted that she herself was appearing in the High Court and she herself was appearing before the District Court and at that time, she was not aware that since the appeal was returned for presentation before the proper Court, a separate application for condonation of delay was required to be preferred.

In my view, considering the aforesaid facts, the learned appellate Judge ought to have permitted the petitioner to prefer a separate application for condonation of delay, as the appeal was time barred by a few days, as submitted by Ms.Mair. The learned appellate Judge, therefore, has committed an error by not exercising his jurisdiction properly by not permitting the petitioner to file an application for condonation of delay in filing such appeal. It is, no doubt, true that if the appeal is time barred, such appeal is required to be dismissed if not supported by an application for condonation of delay. In this behalf, Mr.Raval has cited Supreme Court decisions to substantiate his say that if the appeal is time barred, such appeal is required to be filed supported by an application for condonation of delay.

Ms. Shalini S. Mair, learned Advocate for the petitioner, on the other hand, has relied upon the

decision of the Apex Court in State of M.P. and another v. Pradeep Kumar and another, (2000) 7 SCC 373. The appellant-State before the Apex Court filed a second appeal on 10.12.1996 without the accompanying application for condonation of delay. Subsequently, on 6.1.1997, the appellant filed an application under Section 5 of the Limitation Act. The High Court issued notices to the respondents without deciding the application under Section 5. The respondents moved the Court for disposal of the appeal on the ground that it was barred by limitation. The High Court allowed the motion and dismissed the second appeal. Allowing the appeal of the appellant-State, the Apex Court held that consequences of filing of memorandum of appeal without application for condonation of delay are not fatal and that unintentional lapses of a litigant should not result in closing the doors of the Court permanently. In the said decision, the Apex Court held as under :-

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10. What is the consequence if such an appeal is not accompanied by an application mentioned in sub-rule (1) of Rule 3-A? It must be noted that the Code indicates in the immediately preceding Rule that the consequence of not complying with the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said Rule and that is to return the memorandum of appeal to the appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule prescribing for rejecting of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without an accompanying application to condone delay the consequence cannot be fatal. The Court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is

rejected the same should be taken up along with the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

11. No doubt sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being pointed out by the court. The word "shall" in the context need be interpreted as an obligation cast on the appellant. Why should a more restrictive interpretation be placed on the sub-rule? The Rule cannot be interpreted very harshly and make the non-compliance punitive to an appellant. It can happen that due to some mistake or lapse an appellant may omit to file the application (explaining the delay) along with the appeal.

12. It is true that the pristine maxim vigilantibus non dormientibus jura subveniunt (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.

... .."

Therefore, while accepting the argument of Mr.Raval that the appeal is not competent unless the delay is condoned, in my view, when the petitioner had requested the appellate Court to give time for filing the application for condonation of delay, the appellate court has committed an error in not giving such permission for filing an application for condonation of delay. It is required to be noted that, as stated earlier, the petitioner had filed appeal before the High Court within time. Unfortunately, the appeal was filed before this Court, whereas the same was maintainable before the District Court. Under the circumstances, the High Court itself returned the memo for presenting the same before the District Court. In the process, if there was a delay in presenting the Appeal before the District Court, a liberal view was required to be taken by condoning the delay in presenting the Appeal. Instead of that, the appellate court rejected the application of the petitioner seeking permission to file the application for condonation of delay. Considering the fact that the trial court has passed ex parte decree, it is a fit case in which the Court should have given time to the petitioner for preferring an application for condonation of delay while retaining the memorandum of appeal on record. The appellate Judge has taken a very harsh view of the matter by even not permitting the petitioner to prefer an application for condonation of delay. Naturally, if the delay is condoned, the appeal is required to be decided on its own merits.

At this stage, submission of Mr.Raval is required to be noted. He submitted that this revision is not maintainable, as it is filed against an interlocutory order. However, it is required to be noted that during the pendency of the appeal, an application Exhibit 13 was submitted by the petitioner, requesting the Court to allow the petitioner to prefer an application for condonation of delay in presenting the Appeal. By rejecting such prayer, the entire appeal of the petitioner also stands disposed of, as, naturally the appeal is now not required to be entertained. It, therefore, cannot be said that revision against the order in question is not maintainable. The said contention of Mr.Raval is, therefore, rejected.

Under the circumstances, this revision is required to be allowed and it is accordingly allowed. The judgment and order passed by the 3rd Extra Assistant

Judge, Ahmedabad (Rural), Gandhinagar is quashed and set aside. The petitioner is permitted to file appropriate application in the pending appeal for condonation of delay. Ms.Mair, learned Advocate for the petitioner, submitted that such application will be preferred before the appellate court on or before 5th May, 2004. The appellate Judge may consider such application for condonation of delay on its own merits and, ultimately, if the delay is condoned, the Court shall proceed with the main appeal in accordance with law. However, the application for condonation of delay is required to be decided on its own merits without being influenced by the observations made by this Court in this order. In case the appellate court condones the delay, the appeal should be heard expeditiously as it arises out of matrimonial proceedings. Ms.Mair, learned Advocate for the petitioner, submitted that the respondent-husband has not paid maintenance for four months and her client is required to maintain herself as well as her minor child. If any amount is in arrears, the respondent is directed to deposit the entire amount before the appellate court before the aforesaid date, i.e. 5th May, 2004. On such deposit, the petitioner will be entitled to withdraw the same unconditionally.

Rule is accordingly made absolute, with costs quantified at Rs.2,000/-. The respondent is directed to pay the aforesaid costs on or before 5th May, 2004 before the appellate court. The appellate court, before taking the application, shall ensure that such costs are paid by the respondent-husband to the petitioner-wife.

12th April, 2004 (P.B. Majmudar, J.)

(apj)